No. 87-1148

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In The Supreme Court Of The United States

October Term, 1987

LAURA REAGIN,

Petitioner

v.

CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a/ Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JUDGMENT AND ORDER OF DISTRICT JUDGE ALLOWING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(Filed September 4, 1986)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LAURA REAGIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	C-84-470-G
CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station;) MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,	)	
	)	
Defendants	)	

JUDGMENT and ORDER

BULLOCK, District Judge

This civil action came on for trial before the court and a jury during the week of July 28, 1986, and the issues having been duly tried and answered by the jury as follows:

1. Was the criminal assault on the Plaintiff reasonably foreseeable by the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership?

Yes
(Yes or No)

2. If the answer to Issue No. 1 is "Yes," did the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership, breach their duty of ordinary care under the circumstances by failing to provide adequate security measures?

Yes
(Yes or No)

3. If the answers to Issues Nos. 1 and 2 are "Yes," was the breach of duty by the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership, a proximate cause of the injuries suffered by plaintiff?

Yes
(Yes or No)

4. Were Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership, agents of the Defendant Shell Oil Company by the existence of apparent authority?

Yes
(Yes or No)

5. If the answers to Issues Nos. 1 and 2 and 3 are "Yes," what amount, if any, of actual and compensatory damages is the Plaintiff entitled to recover?

$450,000.00
(amount)

For the reasons set forth in a memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that the Defendants' motions for judgment notwithstanding the verdict pursuant to Rule 50(b), Fed. R. Civ. P., be, and the same hereby are, GRANTED, and that the jury verdict in favor of the Plaintiff be, and the same hereby is, SET ASIDE; and

IT IS FURTHER ORDERED that the Defendants' alternative motions for new trial pursuant to Rule 59, Fed. R. Civ. P., be, and the same hereby are, DENIED.

September 4, 1986.

/s/Frank W. Bullock, Jr.
United States District Judge

MEMORANDUM OPINION OF DISTRICT JUDGE ALLOWING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(Filed September 4, 1986)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LAURA REAGIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	C-84-470-G
CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station;	)	
MT. HOPE SHELL SERVICE STATION, a Partnership;	)	
EDWARD C. BRASINGTON;	)	
SHELL OIL COMPANY;	)	
QUALITY OIL COMPANY OF STATESVILLE, INC.; and	)	
QUALITY OIL COMPANY, a Limited Partnership,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

BULLOCK, District Judge

In this diversity action Plaintiff Laura Reagin sought damages for injuries arising from the criminal acts of a third party which occurred on the premises of the Mt. Hope Shell Service Station during the early morning hours of June 17, 1982. In her complaint she alleged that the Mt. Hope Shell Service Station and its owners and operators, Charles Lawrence Terry and Troy Virgil Terry, the Shell Oil Company, Quality Oil Company, and Quality Oil Company of Statesville, Inc., were negligent in the supervision, maintenance, and safeguarding of the premises. The Plaintiff also alleged that the service station attendant Edward C. Brasington

was negligent in several respects. Prior to trial the court granted Brasington's motion for summary judgment. At trial, and at the close of all of the evidence, the court granted the motions of Quality Oil Company and Quality Oil Company of Statesville, Inc., for a directed verdict in their favor.

Issues were submitted and answered by the jury as follows:

1. Was the criminal assault on the Plaintiff reasonably foreseeable by the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership?

Yes
(Yes or No)

2. If the answer to Issue No. 1 is "Yes," did the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnerhsip, breach their duty of ordinary care under the

circumstances by failing to provide adequate security measures?

Yes
(Yes or No)

3. If the answers to Issues Nos. 1 and 2 are "Yes," was the breach of duty by the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership, a proximate cause of the injuries suffered by plaintiff?

Yes
(Yes or No)

4. Were Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnerhsip, agents of the Defendant Shell Oil Company by the existence of apparent authority?

Yes
(Yes or No)

5. If the answers to Issues Nos. 1 and 2 and 3 are "Yes," what amount, if any, of actual and compensatory damages is the Plaintiff entitled to recover?

$450,000.00
(amount)

Mt. Hope Shell Service Station and its owners and operators, and the Shell Oil Company, have moved for judgment notwithstanding the verdict under Rule 50(b), Fed. R. Civ. P., and, alternatively, for a new trial under Rule 59, Fed. R. Civ. P. The Shell Oil Company also seeks full indemnity from Mt. Hope Shell Service Station and from Quality Oil Company, a limited partnership, for any damages that it may be called upon to pay to the Plaintiff.

Defendants' Motions for Judgment Notwithstanding the Verdict

Even in a diversity case, the sufficiency of the evidence to create a jury question is governed by federal law. Owens by Owens v. Bourns, Inc.,

766 F.2d 145, 149 (4th Cir. 1985), cert. denied, __U.S. __, 106 S.Ct. 608 (1986). The question before the court on the motions by the Defendants for judgment notwithstanding the verdict under Rule 50(b), Fed. R. Civ. P., is whether there is evidence upon which a jury can properly find a verdict. In determining whether the evidence is sufficient, the court is not free to weigh any evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. However, a mere scintilla of evidence is insufficient to sustain a verdict. When a jury is called upon to

determine causation, the inferences it draws to reach its verdict must be reasonably probable; mere speculation is insufficient. Ralston Purina Co. v. Edmunds, 241 F.2d 164, 167 (4th Cir.), cert. denied, 353 U.S. 974 (1957).

With these principles in mind, the court must determine whether the evidence before the jury was sufficient to permit a finding that the criminal attack upon the Plaintiff was not only foreseeable, thus imposing a duty of reasonable care upon the station operators, but also that the operators breached their duty of reasonable care, and that the Plaintiff's injuries were causally related to the breach of duty. It is well established in North Carolina that a store owner is ordinarily not liable for injuries to invitees which result from the

intentional criminal acts of third persons. It is usually held that such acts cannot be reasonably foreseen by the owner, and therefore constitute an independent, intervening cause absolving the owner of liability. Nevertheless, the law recognizes that where circumstances exist which give the owner reason to know that there is a likelihood of conduct on the part of third persons which endanger the safety of his invitees a duty to protect or warn the invitees can be imposed. Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981).

> Since the business operator is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of third persons are occurring or are likely to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety

> of a visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Id. at 639-40, quoting Restatement (Second) of Torts § 344 comment f.

In June 1982, the Mt. Hope Shell Station was open 24 hours a day and was in a relatively isolated area located off Interstate 85 between Greensboro and Burlington. Across from the station was a Texaco station and a restaurant, neither one of which were open late at night. There was also a private residence across from the station. These were the only other buildings in the area. Adjoining the

station was an empty field with a large wooded area behind.

The evidence before the jury was that prior to June 17, 1982, the station had experienced two armed robberies in 1976, and during the December 1976 robbery the station attendant had been shot. In 1974 some tires had been stolen from the station. These were the only criminal acts occurring on the premises. In addition, there had been a break-in at the Texaco station and at a residence in the general area at some unspecified times. The night attendant, Edward Brasington, testified that he carried a pistol for his protection and that he called the Sheriff's Department two or three times a week on the direct line from the station to report suspicious persons and vehicles in the area.

Viewing this evidence most favorably to the Plaintiff, and giving her the benefit of all reasonable inferences from the evidence, including the inference that the past criminal acts were known to the operators of the station in 1982, the court believes that the Plaintiff may have presented just enough evidence to permit the jury to find that it was reasonably foreseeable that criminal acts would occur on the premises which could involve a risk to any invitees present. See Sawyer v. Carter, 71 N.C.App. 556, 561, 322 S.E.2d 813, 817 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 393 (1985) (The North Carolina Court of appeals affirmed summary judgment for defendant in a case involving a convenience-type store where there was less evidence of foreseeability than in

the present case. However, the court said that, although evidence of similar criminal activity committed on the premises is the most probative type of evidence of foreseeability, there is no need to adopt a bright-line rule limiting evidence exclusively to prior crimes on the premises.). See also Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 643, 281 S.E.2d 36, 40 (1981) (Hanes Mall had only one guard for entire parking lot during pre-Christmas shopping season and the mall manager had represented to the public that mall security measures were augmented during that season; 31 incidents had occurred in the parking lot, including 4 or 5 assaults, during the past year. The North Carolina Supreme Court reversed summary judgment for the defendant.); Urbano v. Days Inn

of America, Inc., 58 N.C.App. 795, 798, 295 S.E.2d 240, 242 (1982) (motel's premises were not guarded or patrolled by its own security officers, but instead routine local police visits were relied upon for security, although there were at least 42 episodes of criminal activity on the premises during the three years preceding plaintiff's injury, 12 of which occurred during the immediately preceding three and one-half months; summary judgment for the defendant held to be improper); and Brown v. North Carolina Wesleyan College, 65 N.C.App. 579, 309 S.E.2d 701 (1983) (court's decision upholding summary judgment for defendant turned on foreseeability but the court indicated, based on the forecasts of evidence, that defendant's

security would have been sufficient under the circumstances).

Having resolved the issue of foreseeability in the Plaintiff's favor, the jury was then called upon to determine whether the criminal acts of third persons, which they had found to be reasonably foreseeable, could have been prevented by the exercise of ordinary care. A landowner's duty to use reasonable care to safeguard his business invitees from the criminal acts of third persons arises only if such acts are reasonably foreseeable. The question thus becomes what would be reasonable care under the circumstances, considering the evidence of conditions in the surrounding area, the general character of the neighborhood, the location of the premises, the character of the business

enterprise, and other criminal activity occurring on the premises. Sawyer, 71 N.C.App. at 561, 322 S.E.2d at 817.

The undisputed evidence before the jury was that the Mt. Hope Shell Service Station was staffed during the late evening and early morning hours by one attendant, age fifty-five, who had suffered a slight stroke and who had not been given any emergency training, and that the attendant carried a pistol for protection. The operators of the station had also installed a direct telephone line to the Guilford County Sheriff's Department, which the night attendant used two or three times a week to report suspicious activity in the area. The station was lighted by floodlights at the top of five poles around the station area and also by lights under the eaves of the station.

One of the floodlights at the back area of the station near the empty field was not operating on June 16-17, 1982. The windows of the station were partially obscured by displays, thus hindering vision in and out of the building.

The court is of the opinion that the only facts before the jury from which they could infer a breach of ordinary care by the station operators were the single attendant, the partially-obscured windows, and the inoperable pole light.[1] As to the

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[1]Although the Plaintiff argued that it was negligence for the operators to have a 55-year-old man, who had suffered a slight stroke, on duty at night, and to arm him with a pistol, and for him to have allowed the assailant to loiter in the station prior to the robbery and attack, the court instructed the jury that there was no evidence from which they could find that the action or inaction of the attendant was negligent, since he had no time or duty to act because he could not do so without risk to his own safety. The evidence also indicated that the assailant "got the drop" on

windows, it is highly speculative whether the Plaintiff would have noticed anything out of the ordinary if she could have easily looked through the windows before entering the station, even if she attempted to do so; in any event when she entered the station, she noticed nothing unusual about the two men standing inside and went directly to the restroom. Although the robber assaulted the Plaintiff in the darkened area near the

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the attendant from behind with a sawed-off shotgun or rifle, and then disarmed him. See Higgins v. New Orleans Public Service, Inc., 347 S.2d 944 (La. 1977); Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977); Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 20 S.E.2d 299 (1942); see also Reagin v. Terry, slip op. C-84-470-G (M.D.N.C. March 26, 1986) (memorandum opinion by which the court dismissed Brasington as a defendant on his motion for summary judgment, and in which the cases cited above are discussed).

inoperable light pole, he already had her at gunpoint before exiting the station, and could have just as easily walked a few feet more beyond the station into the field or wooded area to carry out his attack. Thus any breach of duty depends substantially on the failure of the station operators to have more than one attendant on duty at night. Plaintiff presented no evidence that additional attendants were the custom at other similarly-situated all-night stations, or that silent alarms, television cameras, or other security devices were used at other locations.[2] In fact, all of the

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[2]Sergeant C. B. Willis of the Guilford County Sheriff's Department, called as a witness by the Plaintiff, testified that he had been assigned to the Mt. Hope Shell Station area for seven years, that the station was well-lighted, and that the Mt. Hope Station was no more susceptible to crime than any other twenty-four hour operation.

evidence before the jury was to the effect that other all-night businesses at the time were customarily staffed by only one attendant. Even if it was a breach of duty for the station operators not to have had a second night attendant, the court believes it would be sheer speculation for the finder of fact to determine either that a second attendant would have deterred the robber, or would have been able to prevent him from carrying out his unlawful acts. Cf. Foster, 303 N.C. 636, and Urbano, 58 N.C.App. 795.

Finally, even if it is assumed that the Plaintiff's evidence was sufficient on both the issues of foreseeability and breach of the duty of reasonable care, there still must be evidence from which the finder of fact could find that the Defendants'

negligence was, as a matter of reasonable probability, causally related to the criminal assault on the Plaintiff both as a cause in fact and a proximate cause of Plaintiff's injuries. It cannot be said on the basis of evidence presented at trial that Defendants' conduct actually caused Plaintiff's injuries as a matter of fact; neither can it be said that those injuries would not have been sustained without Defendants' conduct or failure to act. The evidence is uncontradicted that the assailant was an experienced criminal, just a few days out of prison, who determined while riding along the interstate with friends to "rob something" prior to observing or knowing anything at all about the Mt. Hope Shell Service Station. Again, to determine that the

assailant would have been deterred or thwarted by two attendants, or by additional lighting, is to speculate about mere possibilities, rather than to find reasonable probability. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982); Ralston Purina Co. v. Edmunds, supra.

The Plaintiff in this case is an undeniably sympathetic victim of a tragic act for which she is in no way responsible. Indeed, the Plaintiff has made a commendable effort to carry on a normal life following an experience for which no amount of money can fully compensate. However, by insisting on reasonable probability rather than mere possibility to support a jury verdict, the court recognizes its duty not to ignore current legal standards simply

because the Plaintiff presents a sympathetic case.

Defendant Shell Oil also contends that there is insufficient evidence from which the jury could find that the Terrys were agents of Shell by the existence of apparent authority. Despite the absence of an express agency relationship, an agency may be created by manifestations made by the alleged principal to a third person or the public at large, and the reasonable belief by a third person to whom the manifestations are made that the purported agent is authorized to bind or act on behalf of the principal. Restatement (Second) Agency § 8 (1957). In other words, a principal is held accountable for the acts of one he "holds out" as his agent. In order to prevail on this theory of liability,

the Plaintiff must prove both a reasonable and justifiable reliance upon the principal's manifestations of authority, and that the conduct of the agent was within the scope of his apparent authority. See Gizzi v. Texaco, Inc., 437 F.2d 308, 309-10 (3d Cir.), cert. denied 404 U.S. 829 (1971); see also Note, Agency--Apparent Authority and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators, 50 N.C.L. Rev. 647 (1972).

The evidence submitted on this issue was as follows: that, during an interstate journey, Plaintiff observed the scallop shell sign from the highway; that knowing the sign to be affiliated with Shell Oil Company and that Shell was a national brand she

could trust, she exited toward the Mt. Hope Shell Station for a rest stop and to purchase coffee; that she had never purchased Shell's petroleum products and did not have a Shell credit card; that she remembered seeing two Shell "answer man" booklets; and that she believed Shell maintained a "safe place of business." Plaintiff contends that the scallop shell sign, Shell insignia and uniform worn by the night attendant, and the two "answer man" booklets are sufficient to constitute manifestations by Shell of the station's apparent authority. In Gizzi, supra, the court determined that the display of Texaco's insignia and slogan ("trust your car to the man who wears the star") were sufficient to raise a jury question on apparent authority, albeit not "an overwhelming

case of liability." 437 F.2d at 310. In Huffman v. Gulf Oil Corporation, 26 N.C.App. 376, 216 S.E.2d 383 (1975), the North Carolina Court of Appeals affirmed a directed verdict for the defendant Gulf Oil stating "that a dealer's activity in keeping a watchdog is clearly beyond the borderline of the apparent agency doctrine, especially where, as here, the watchdog is used in connection with a separate business on adjacent, but separately leased premises." 216 S.E.2d at 387. In both Gizzi and Huffman, the courts focused on the scope of the apparent authority wielded by the alleged agents, apparently accepting the plaintiffs' claims that the oil corporations' manifestations in the form of advertising were adequate indications of control on which the plaintiffs had

relied. Similarly in this case, the scallop shell sign which was observed from the highway and at the station would induce reasonable reliance that Shell held out this particular station to be its agent.

The manifestations alone, however, do not make Shell Oil liable because Plaintiff must also show that the purported agent's conduct was within the scope of his apparent authority. In Huffman, the court ruled in favor of Gulf since the dealer's activity was "clearly beyond" the scope of his apparent authority. In that case, the minor plaintiff's injuries were sustained in an attack by a dog which was kept by the station owner in connection with a separate coal and wood business operated on leased property separate from the service

station. Also, in Gizzi the trial court held that the principal's manifestations "could not possibly be construed to apply to installing new brake systems or selling used cars" but could apply to "the servicing of automobiles, ... to the extent of putting gas in them and the ordinary things that are done at service stations." 437 F.2d at 310. Although this holding was reversed by the court of appeals, it is clear that the dispositive element of proof concerned the scope of apparent authority. Likewise in this case, the issue of Shell's liability based on apparent authority hinges on the scope of authority held by the Terrys. Defendant Shell Oil contends that it should not be held liable since Plaintiff did not purchase any of its

petroleum or related products but only utilized restroom facilities and purchased coffee. The court is of the opinion that there is sufficient evidence to present a jury question as to whether the maintenance of safe premises, including restroom facilities, is within the scope of the Terrys' apparent authority. Unlike the operation of a coal and wood business as presented in Huffman, the operation of premises for safe public usage appears to be within the realm of reasonable expectation for service station operations.

Defendants' Alternative Motions for a New Trial

Defendants have also moved, in the alternative, for a new trial under Rule 59, Fed. R. Civ. P. The Defendant Shell Oil Company contends that the jury verdict was against the weight of

the evidence and was excessive. The Terry Defendants cite a number of grounds in addition to their arguments presented in support of their motion for judgment notwithstanding the verdict. They rely principally on an improper question by Plaintiff's counsel in cross-examination of Troy Terry concerning a twenty-five-year - old breaking and entering conviction, the court sustaining Plaintiff's objection to defense counsel's question to Sergeant Willis of the Greensboro Police Department on cross-examination which asked, "In your opinion would any measures have prevented this?", and the contention that the jury's findings were against the weight of the evidence and the product of sympathy, passion, and prejudice.

Assuming arguendo that the Plaintiff has met her burdens on foreseeability, negligence, and causation, the court does not believe that a new trial should be granted on the grounds that the verdict was against the weight of the evidence. The court is aware that upon a motion for a new trial under Rule 59 it has the responsibility to weigh all of the evidence and consider the credibility of witnesses and other pertinent factors to determine whether the verdict was "'against the clear weight of the evidence or is based upon evidence which is false or will result in a miscarriage of justice.'" Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891-92 (4th Cir. 1980), quoting Williams v. Nichols, 266 F.2d 389, 392 (4th Cir. 1959). Ordinarily,

a trial judge who believes the plaintiff's evidence to be insufficient as a matter of law would also believe that a verdict for the plaintiff based on the same evidence would be against the weight of the evidence. However, in this case there was practically no conflicting evidence to weigh; Defendants' witnesses did not contradict the Plaintiff's evidence and Defendants' cross-examination did nothing to impeach the Plaintiff's witnesses.[3] Therefore, the court believes that under the unique

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[3]The only significant credibility issue was the Terry Defendants' contention that they were not aware of previous criminal activity at the Mt. Hope Station in 1976, despite the fact that at the time they were operating another Shell station just fourteen miles away, and the December 1976 shooting at Mt. Hope received widespread media coverage. In weighing the evidence, the court would resolve this credibility issue against the Defendants.

circumstances of this case if Plaintiff's evidence is legally sufficient the verdict should stand, especially since the essential facts before the jury were not in dispute. Nor does the court believe that a new trial should be granted for the additional reasons cited by the Terry Defendants. As to the improper question by Plaintiff's counsel concerning the prior conviction of Troy Terry, the court immediately gave an instruction to the jury directing them to completely disregard the question; as to the question by defense counsel to Sergeant Willis, who was not qualified as an expert, the court ruled that any answer he would give to the question would not aid the jury and would be mere speculation, and the court also excluded it under Rule 403,

Fed. R. Evid., even if relevant and proper. The court does not believe that the other grounds cited by the Terry Defendants for a new trial, including the size of the verdict itself, the court's instructions as to the jury, or any of the other conclusory allegations by the Defendants, warrant a new trial. The court believes that the proper disposition of this case is to grant the Defendants' motions for judgment notwithstanding the verdict, and deny the Defendants' motions for a new trial, whereupon the issues of foreseeability, negligence, and causation will be reviewed fully by the court of appeals, and the jury's verdict will be either reinstated or set aside as may be deemed appropriate.

Defendant Shell Oil Company's Cross-Claims for Indemnity

Despite the granting of the Defendants' Rule 50(b) motions, the court will rule upon the cross-claims of Shell Oil Company so that all issues before the trial court will be resolved and can be considered by the court of appeals if necessary.

The jury verdict found that the Mt. Hope Shell Service Station and the Terry Defendants were liable to the Plaintiff, and that Shell Oil Company was also liable on the basis of apparent authority. Shell seeks full indemnity from the station and the Terrys for any damages that Shell may be called upon to pay to the Plaintiff by reason of the negligence of the station owners and operators. Shell's liability to the Plaintiff is derivative, based on the tortious

conduct of the station owners and operators, and therefore Shell is entitled to recover full indemnity from Mt. Hope Shell and the Terrys. See, e.g., Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968); Hornby v. Pennsylvania Nat. Mut. Cas. Ins., 77 N.C.App. 475, 484, 335 S.E.2d 335, 341 (1985), cert. denied, 316 N.C. 193, 311 S.E.2d 570 (1986).

Shell also seeks indemnity from Quality Oil Company, a limited partnership, based on a provision in the jobber contract between Shell and Quality. At the close of the evidence in this case, the court granted Quality's motion for a directed verdict and dismissed it from the case, ruling that there was insufficient evidence that Quality exercised control over the operations of the Mt. Hope Shell

Station. Paragraph 11.1 of the jobber contract between Shell and Quality provides as follows:

> 11.1 Indemnity. Buyer shall defend and indemnify Shell, its employees and agents, against all claims, suits, liabilities, losses and expenses (including attorneys' fees and other costs of litigation) arising out of any injury, disease or death of persons (including Buyer or Buyer's employees and including injury to personal rights or relations) or damage to property (including Buyer's) caused by or happening in connection with Buyer's loading, transportation, unloading, storage, handling, sale or use of the Products sold hereunder, except when caused (a) by the sole negligence of Shell, its employees or agents, or (b) by defects in the Products not caused or contributed to by any act or omission of Buyer or Buyer's employees or agents. Shell shall have the right, but not the duty, to participate in the defense of any claim or litigation with attorneys of Shell's selection. Buyer's obligations hereunder shall survive any termination of this contract.

Quality contends that any liability caused by the sole negligence of Shell

or its agents is specifically excluded from indemnification under Paragraph 11.1 in that the language provides that Quality shall defend and indemnify Shell from certain listed occurrences "except when caused (a) by the sole negligence of Shell, its employees or agents, ..." Quality points out that the jury in this action found that Shell was liable to the Plaintiff only because it believed that the Terry Defendants were clothed with apparent authority.

Quality also contends that a further reason for denying indemnity is that the assault on the Plaintiff was not an occurrence covered by the terms of Paragraph 11.1, in that the language provides that Quality shall defend and indemnify Shell for certain listed occurrences arising out of injury

"caused by or happening in connection with Buyer's [Quality's] loading, transportation, unloading, storage, handling, sale or use of the Products sold hereunder." Quality contends that the language used was drafted by Shell and clearly refers to injuries arising only out of the transportation and handling of Shell products, and not to unrelated incidents happening on the premises of stations to which Quality might ultimately supply gasoline.

The court finds the arguments of Quality to be persuasive. The jury found that Shell, by allowing the use of its signs, uniform, and other indicia of authority, allowed the Mt. Hope Shell Station to represent to third parties, and permitted them to believe, that the station had an agency relationship with Shell. Also, the

court does not believe from the evidence presented at trial concerning the jobber contract, and construing the instrument as a whole, that the indemnity provision was intended by the parties to apply to liability of this type, nor can such coverage be reasonably inferred from the language used. The claim in this case was not caused by nor did it happen in connection with the sale or use of gasoline pursuant to the jobber contract except in the very broadest sense. Any ambiguity should be construed against the drafter of the agreement. Therefore the court will deny the cross-claim by Shell Oil Company against the Quality Oil partnership.

A judgment and order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

In the event the jury's verdict is reinstated, the court will enter an appropriate order or judgment based on the rulings made in this memorandum opinion concerning the Defendant Shell Oil Company's cross-claims against the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, the Defendant Mt. Hope Shell Service Station, and the Defendant Quality Oil Company seeking indemnity for any potential liability of Shell to the Plaintiff in this case.

September 4, 1986

/s/Frank W. Bullock, Jr.
United States District Judge

OPINION OF COURT OF APPEALS FOR FOURTH CIRCUIT AFFIRMING JUDGMENT IN DISTRICT COURT

(Decided August 26, 1987)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1690

LAURA REAGIN

Plaintiff - Appellant

v.

CHARLES LAWRENCE TERRY, d/b/a Mt. Hope Shell Service Station, individually; TROY VIRGIL TERRY, d/b/a Mt. Hope Shell Service Station, individually; MT. HOPE SHELL SERVICE STATION, a partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY I, Limited Partnership; QUALITY OIL COMPANY II, Limited Partnership

Defendant - Appellee

No. 86-1694

LAURA REAGIN

Plaintiff - Appellee

v.

SHELL OIL COMPANY

Defendant - Appellant

and

CHARLES LAWRENCE TERRY, d/b/a Mt. Hope Shell Service Station, individually; TROY VIRGIL TERRY, d/b/a Mt. Hope Shell Service Station, individually; MT. HOPE SHELL SERVICE STATION, a partnership; EDWARD C. BRASINGTON; QUALITY OIL COMPANY I, LIMITED PARTNERSHIP; QUALITY OIL COMPANY II, LIMITED PARTNERSHIP

Defendants

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Frank W. Bullock, Jr., District Judge. (CA-84-470-G)

Argued: May 7, 1987

Decided: August 26, 1987

Before HALL, PHILLIPS, AND WILKINS, Circuit Judges.

David M. Clark (John R. Erwin; B. Douglas Martin; Clark & Wharton on brief) for Appellant; Frederick K. Sharpless (Joseph E. Elrod, III; J. Reed Johnston, Jr.; Tuggle, Duggins, Meschan & Elrod on brief); Richard V.

Bennett (William K. Davis; Bell, Davis & Pitt, P.A. on brief); Leigh F. Saint-Germain (William G. Lowerre on brief) for Appellees.

PER CURIAM:

Plaintiff Laura Reagin appeals the district court's grant of Defendants' motion for judgment notwithstanding the verdict. In granting the motion, the district court held that on the evidence presented the Defendants were not liable for the criminal acts committed by a third person. We affirm.

I.

Reagin departed Atlanta, Georgia on the evening of June 16, 1982 to journey to her brother's wedding in New Jersey. She traveled without incident until approximately 3:30 a.m. when she neared Greensboro, North Carolina. She then exited form the interstate highway

at the Mount Hope Shell Station to use the restroom and purchase some refreshments.

Approximately forty-five minutes to one hour earlier, Lorenzo Woodward had arrived at the station on foot. Woodward, released from prison a few days earlier, had been dropped off at the interstate exit by two friends after telling them he wanted to rob something. He entered the Mount Hope station and informed the attendant, Edward Brasington, that he had encountered mechanical problems with his automobile on the interstate.[1] Brasington told Woodward that a tow truck driver would be in at 6:00 a.m.,

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[1]Because the district court granted Brasington's motion for summary judgment, the majority of his deposition testimony was not before the jury. However, we have included portions of his testimony in order to provide a full recitation of the facts.

but could be called immediately for an additional charge. Woodward declined the offer of an immediate call and remained in the station, chatting with Brasington.

When a food merchandise salesman arrived and began servicing the station, Woodward twice entered the restroom complaining of stomach pain. Following the departure of the salesman, Woodward approached Brasington from behind with what Brasington testified was a sawed-off .22 caliber rifle. This gun was never located by law enforcement officers. Woodward then removed a .25 caliber handgun from Brasington's pocket.

It was at this time that Reagin drove into the station parking lot. She testified she could only see the men's heads above the merchandise racks

against the windows. She entered the station and went directly to the restroom. She stated that Brasington looked at her as she passed through the station, although Brasington denied this. When asked by Woodward if a woman entered, Brasington said no, it was a man, mistakenly believing that a white male accomplice to Woodward had arrived at the station.

While Reagin was in the restroom, Woodward emptied the cash register and marched Brasington at gunpoint to the side of the station parking area. Reagin exited the restroom and, looking over the merchandise racks once again, saw the heads of the two men. She testified that she believed they were going to look at a car.

Woodward took Brasington to a darkened area under a burned out

perimeter light and told him to cross a small wooden fence and keep walking. Brasington did as he was told. Woodward returned to the station and approached Reagin from behind as she waited to pay for items she had selected. He robbed her, took her to the same area where he had taken Brasington, and raped her. At one point, Woodward remarked, "He's going to get himself killed." Reagin testified she looked up and saw Brasington, from a distance, watching them from a field adjacent to the station lot. Brasington testified he began to return to the station from the field after a few minutes, but a figure in the shadows motioned him away. He then walked across the field, through a forest, crossed a road and attempted to get help at a residence, but was unable

to obtain assistance. Meanwhile, Woodward forced Reagin to leave with him in her automobile. Brasington eventually returned and called the police, reporting he had been robbed by a black male and a white male. Woodward subsequently abandoned Reagin and the automobile. He was eventually apprehended.

II.

Reagin brought suit against several Defendants associated with the operation of the station, alleging responsibility for the criminal acts of Woodward. Pursuant to various rulings by the district court, the case was submitted to the jury only as to the two partners who owned and operated the station, the partnership itself, and Shell Oil Company. The jury returned a verdict in Reagin's favor, finding the

criminal acts were reasonably foreseeable, the Defendants breached their duty of care, and that Reagin's injuries were caused by the breach.

Subsequently, the district court denied Defendants' motion for a new trial and granted the motion for judgment notwithstanding the verdict. In a written order, the court first held Reagin presented "just enough" evidence to permit the jury to find it was reasonably foreseeable that criminal acts would occur on the premises. The court went further and ruled that assuming the evidence was sufficient to establish a breach of ordinary care by the failure to take additional security precautions, it was mere speculation for the jury to find the alleged breaches were the cause of

Reagin's injuries.[2] The court specifically stated "[i]t cannot be said on the basis of [the] evidence presented at trial that Defendants' conduct actually caused Plaintiff's injuries as a matter of fact; neither can it be said that those injuries would not have been sustained without Defendants' conduct or failure to act."

III.

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[2]Although we affirm the district court's decision on the basis of lack of causation, we note that Reagin's claim of negligence in having merchandise racks blocking her view into the station is without foundation.

Reagin relies on the Shell Appearance Guide which provides: "Windows are made to look into and see out of. The first rule for any window display is to start with sparkling clean windows both inside and outside." However, the instruction refers to cleanliness prior to setting up a display, and does not involve security concerns. In fact, the window posters pictured in the guide would have blocked Reagin's view just as the merchandise racks did.

In reviewing the grant of a judgment notwithstanding the verdict, we must view the evidence and the inferences therefrom in the light most favorable to the non-moving party. The inferences drawn by the jury to reach its verdict must be reasonably probable; mere speculation is insufficient. E.g., Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-42 (4th Cir. 1982).

In the instant case the district court found the inferences drawn by the jury on the question of causation failed to rise to the level of reasonable probability. While we have the utmost sympathy for Reagin, our careful review of the record conclusively shows that the assessment made by the district court was correct. Accordingly, for the reasons stated by

the court below, we affirm the grant of the Defendants' motion for judgment notwithstanding the verdict. The remaining issues raised on appeal are mooted by the affirmance of the district court's decision.

AFFIRMED.

ORDER OF COURT OF APPEALS OF FOURTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed October 7, 1987)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1690
No. 86-1694

Laura Reagin,

Appellant,

versus

Charles Lawrence Terry, etc., et al,
Appellees.

On Petition for Rehearing with
Suggestion for Rehearing In Banc.

O R D E R

The appellant/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Hall and Judge Phillips.

For the Court,
/s/John M. Greacen, Clerk

JUDGMENT AND ORDER OF DISTRICT JUDGE ALLOWING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT BRASINGTON

(Filed March 26, 1986)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LAURA REAGIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	C-84-470-G
CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station;)	)	
MT. HOPE SHELL SERVICE STATION, a Partnership;	)	
EDWARD C. BRASINGTON;	)	
SHELL OIL COMPANY;	)	
QUALITY OIL COMPANY OF STATESVILLE, INC.; and	)	
QUALITY OIL COMPANY, a Limited Partnership,	)	
	)	
Defendants	)	

JUDGMENT and ORDER

BULLOCK, District Judge

For the reasons set forth in a memorandum opinion filed contemporaneously herewith,

IT IS ORDERED and ADJUDGED that the motion for summary judgment of Defendant Edward C. Brasington is GRANTED and that this action be, and the same hereby is, DISMISSED as to Defendant Brasington; and

IT IS ORDERED that the motions for summary judgment of Defendants Charles Lawrence Terry, Troy Virgil Terry, Mt. Hope Shell Service Station, Shell Oil Company, Quality Oil Company of Statesville, Inc., and Quality Oil Company are DENIED.

March 26, 1986.

/s/Frank W. Bullock, Jr.
United States District Judge

MEMORANDUM OPINION OF DISTRICT JUDGE ALLOWING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT BRASINGTON

(Filed March 26, 1987)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LAURA REAGIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	C-84-470-G
CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station;) MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

BULLOCK, District Judge

In this diversity of citizenship action all Defendants have filed motions for summary judgment. Plaintiff Laura Reagin seeks compensatory and punitive damages for injuries arising from criminal acts that occurred at the Mt. Hope Shell Service Station on June 17, 1982. She alleges that Defendants Shell Oil Company, Quality Oil Company, Quality Oil Company of Statesville, inc., and Charles and Troy Terry, both as individuals and in their capacity as the Mt. Hope Shell Station's partnership, were negligent in the supervision, maintenance, and safeguarding of the premises. Plaintiff also alleges that Defendant

station attendant Edward C. Brasington negligently failed to summon the police in a timely fashion while the attack was in progress. After consideration of the extensive briefs, supplemental briefs, and supporting documents filed in support of and in reply to Defendants' motions, as well as the applicable North Carolina legal standards, the court will grant summary judgment to Defendant Edward C. Brasington, but will deny all remaining Defendants' motions.

FACTUAL BACKGROUND[1]

The action before this court arose from criminal acts which were perpetrated at the Mt. Hope Shell Service Station on June 17, 1982. Mr. Edward C. Brasington, who is 40%

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[1]The court's summary of the factual background is taken from the pleadings, affidavits, depositions, and briefs of the parties.

disabled on one side of his body due to a stroke, was the sole attendant on duty during the "third shift" from midnight until 6:00 a.m. Sometime after 3:00 a.m. on June 17, a man, who claimed that his car had broken down on Interstate 85, entered the station and asked for a wrecker. Upon being told that no such service would be available under 6:30 a.m. he lingered in the station, excusing himself to use the restroom three different times. After his third retreat to the men's room, the man emerged and walked up behind the then-seated attendant with what Mr. Brasington took to be a sawed-off .22 caliber rifle. The robber then proceeded to "hold up" Brasington, taking his billfold and his pistol.

As this was occurring, Ms. Reagin entered the station and went directly

to a ladies' room, not noticing that a robbery was in progress. While she was using the facilities, the robber directed Mr. Brasington to give him the cash register contents, exit the station, walk to and step over the rear fence surrounding the service area, and walk across the adjacent field into nearby woods. The robber then returned to the station, where he found Ms. Reagin standing at the counter and, threatening her with Mr. Brasington's pistol, instructed her to empty her pockets. Subsequently the assailant led the Plaintiff outside where he first unsuccessfully attempted to rape her near the trash dumpster, and then successfully completed the act by the fence. He immediately kidnapped Ms. Reagin for a period of time, using her automobile for his escape.

Just before this assault began, Mr. Brasington started to return to the station area and was threateningly waved back by the robber. According to the Defendant attendant, who claims he was never close enough to see that the second "shadowy figure" was a woman, he then made his way through the woods and across the street where he first attempted to rouse the residents of the only house in that area. When they refused to answer at that late hour, Brasington allegedly hid behind a pickup truck and watched the station until it appeared that the robber must have departed. In her deposition and complaint, Ms. Reagin states that before Brasington crossed the street he returned to the area where she was attacked and observed the rape in progress. Whether or not this is the

case, Brasington did contact the Sheriff's Department at about 4:20 a.m., when it became clear to him that the robber had departed.

Subsequent to the apprehension of and disposition of the case against her assailant, Ms. Reagin commenced the present action.

DISCUSSION

Federal Rule of Civil Procedure 56(b) permits the court to grant summary judgment only if the pleadings, depositions, interrogatory answers, admissions, affidavits, and other documents show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The burden is on the moving party to make such a showing. The court must assess any inferences from the depositions and

other documentary material in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Even if there is no dispute as to the evidentiary facts, summary judgment is inappropriate if conflicting inferences reasonably can be drawn from those facts. Fortress Re, Inc. v. Central National Insurance Company of Omaha, 766 F.2d 163, 166 (4th Cir. 1985); Magill v. Gulf & Western Indus., Inc., 736 F.2d 976, 979 (4th Cir. 1984). Summary judgment is rarely appropriate in actions based upon negligence. Spaulding v. ADS-Anker Data Systems Midwest, Inc., 498 F.2d 517, 518 n.1 (4th Cir. 1974); see also C. Wright, A. Miller & M. Kane, Federal Practice and Procedure Civil § 2729 at 194 (1983).

I. Motions for Summary Judgment of Defendants Charles and Troy Terry, Mt. Hope Shell Service Station Partnership, Shell Oil Company, Quality Oil Company of Statesville, Inc., and Quality Oil Company.

Whereas federal law controls the issue of when summary judgment is appropriate, under the Erie doctrine North Carolina state law controls the issue of what duty a landowner or proprietor owes to business invitees who are attacked by third-party criminals. The North Carolina Supreme Court has held that

> Under both the Restatement (Second) of Torts and the prior decisions of this court, foreseeability is the test in determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons .... If an invitee [while on the premises sustains an injury] from the criminal acts of a third person, which acts were reasonably foreseeable by the store owner, and which could have been prevented by the exercise of ordinary care, then the plaintiff

> has set forth a cause of action in negligence which, if proved, would entitle that plaintiff to recover damages from the store owner.

Foster v. Winston-Salem Joint Venture, 303 N.C. 636, __, 281 S.E.2d 36, 39 (1981). The North Carolina courts have also discussed the extent to which evidence should be admissible to prove foreseeability of the criminal act. In a recent decision the North Carolina Court of Appeals reviewed the evidentiary rule applied by other jurisdictions in this situations, and finding a "dramatic variant in willingness to consider evidence of criminal activity not occurring on the premises," the court expressed its preference for the "cases that take a more inclusive approach, considering the primary and the surrounding neighborhood, as well as the location and character of the business

enterprise." Sawyer v. Carter, 71 N.C.App. 556, _, 322 S.E.2d 813, 816 (1984). Thus, the court concluded that it sees "no need to adopt a bright-line rule limiting evidence exclusively to that of prior times on the premises. [All relevant evidence is admissible and] evidence pertaining to the foreseeability of criminal attack shall not be limited to prior criminal acts occurring on the premises." Id. at 817.

Under this standard it would be inappropriate to grant summary judgment for a Defendant whose position in relation to the service station is that of proprietor, station owner, or one who exercises control over the safety features of the station. The pleadings and depositions submitted to the court reveal several evidentiary facts that

would be relevant at trial to the issue of foreseeability. This evidence includes: the isolated location of this station by Interstate 85; the fact that a direct line to the Sheriff's Department had been installed in the station, indicating that the owners were concerned about this location; the station owners' practice of leaving only a partially-disabled employee on duty during the late-night shift, and Mr. Brasington's own testimony that he carried a gun for his own protection and made it a practice to use the direct Sheriff's telephone line two or three times a week to report "a suspicious vehicle or a suspicious person walking off the Interstate."

It would also be inappropriate at this time to dismiss either of the Quality Oil Companies or the Shell Oil

Company from this action, the Plaintiff having presented valid arguments about both the extent of these Defendants' control over the safe maintenance of this Shell station, and the Plaintiff's reliance on the Shell name and its association with safety. The documents before this court also reveal some ambiguities as to whose safety and maintenance standards were being applied to this station. For instance, in his deposition Charles Terry states that Quality now makes occasional inspections during the year, which formerly were made by Shell. Further, a representative of Quality told Terry that the company would exercise the same "strict standards" as did Shell. It is not clear from the "jobber contract" between Quality and Shell that Shell had thereby relinquished the

application of its standards to the local Shell stations. Thus, at this juncture the court will not grant Defendants' motions for summary judgment. In so holding this court states no conclusions as to the ultimate viability of each claim Plaintiff has presented against each of the Defendants.

II. Defendant Edward C. Brasington's Motion for Summary Judgment.

The law traditionally has refused to impose a duty upon one to aid another who is in peril. Exceptions have been carved out to this doctrine where a special relation between the parties has afforded a justification for the creation of a duty. This duty has been imposed upon: family members, innkeepers, carriers, employers, those affected by maritime law, and

shopkeepers. W. Prosser, The Law of Torts 4 Ed. 340-43 (1971). It is generally agreed that where this duty is recognized it calls for nothing more than reasonable care under the circumstances. This doctrine has been recognized by the North Carolina courts which have long held that "there is no duty to aid others in peril without the defendant's fault [or negligence], but through his conduct [citations omitted]; yet if plaintiff is hurt through defendant's [negligence], defendant must take all steps necessary to mitigate the hurt." Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 300, 203 S.E.2d 199, _ (1942) (plaintiff was injured in collision between his automobile and defendant's train, after which defendant's employees allowed him to lie

unconscious on the roadbed approximately one hour).

The North Carolina courts have not directly addressed the question of whether a business owner and his employees have a duty to rescue or seek assistance for an invitee who is imperiled by a third party's criminal acts. However, upon reviewing analogous North Carolina law and the analyses of other jurisdictions, the court concludes that North Carolina courts would impose such a duty only if the threat to the invitee came to the business employee's attention in time for him to act, and only if the employee could act without fear of risking injury himself.

The Louisiana courts have formulated this very standard in similar cases, holding that they will

impose liability only when there is sufficient time for police response before plaintiff's injury and if the proprietor (or his representative) could summon the police or warn the plaintiff of danger without incurring the risk of harm. Higgins v. New Orleans Public Service, Inc., 347 S.2d 944 (1977); Anderson v. Clements, 284 S.2d 241 (1973). Similarly, the Illinois courts have followed a Pennsylvania decision, Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943), in holding that no duty to comply with criminal demands should be imposed upon an employee, even when such resistance by the employee caused the bystander plaintiff to be injured. Bence v. Crawford Savings and Loan Association, 400 N.E.2d 39 (Ill.App. 1979); Boyd v.

Racine Currency Exchange, Inc., 306 N.E.2d 39, 66 Ill.2d 95 (1973).

There is analogous North Carolina precedent to uphold this line of reasoning. The state supreme court has held that: "In the place of amusement or exhibition, just as in the store ... the proprietor is liable for injuries resulting from the horseplay or boisterousness of others [only] ... if he has sufficient [and timely] notice to enable him to stop the activity." Manganello v. Permastone, Inc., 291 N.C. 666 (671), 231 S.E.2d 678 (1977) (quoting Aser v. City of Charlotte, 265 N.C. 494, 144 S.E.2d 610, 615 [1965]).

Mr. Brasington and Ms. Reagin have offered conflicting versions of the sequence of events on June 17, 1982. Mr. Brasington has stated that he never knew that a second person he saw was a

woman, much less that she was being assaulted. Ms. Reagin stated that Brasington returned twice to approach the darkened area beside the station, and the second time observed the rape while it was in progress. If so, the court notes that he would have also observed the assailant's departure with her immediately thereafter. At that time he would have been likely to telephone the Sheriff's Department from the station, rather than crossing the street again to delay his call until another customer stopped at the Shell station and he was certain that it was safe to return.

The court concludes that, regardless of whose account would be more persuasive to the trier of fact, this is not an issue of material fact to be carried past the summary judgment

stage, as Mr. Brasington was under no legal duty to rescue Ms. Reagin. Neither version describes circumstances in which Mr. Brasington either could have summoned the police in time to stop the attack on the Plaintiff, or could have done so without fearing that his own safety was at risk. Furthermore, even if Brasington witnessed the attack on Ms. Reagin, he was under no duty to ignore the assailant's threats by attempting to rescue her himself, perhaps further endangering himself and her in doing so.

For the foregoing reasons the court will grant Defendant Edward C. Brasington's motion for summary judgment and deny all remaining Defendants' motions for summary judgment.

March 26, 1986

/s/Frank W. Bullock, Jr.
United States District Judge

TABLE OF CIRCUIT COURTS OF APPEAL POSITIONS ON SUFFICIENCY OF THE EVIDENCE STANDARD

1. Circuits which hold state standard governs:

   Second

   Mehra v. Bentz, 529 F.2d 1137, 1139 (2d Cir. 1976), cert. denied 426 U.S. 922, 96 S.Ct. 2628, 49 L.Ed.2d 375 (1976)

   Sixth

   Pinkley v. Seaboard System Railroad, 813 F.2d 787, 789 (6th Cir. 1987)

   Seventh

   Dickerson v. Amax, Inc., 739 F.2d 270, 272 (7th Cir. 1984)

2. Circuits which hold federal standard governs:

   First

   Cowdell v. Cambridge Mutual Ins. Co., 808 F.2d 160, 162 (1st Cir. 1986)

   Fourth

   Wratchford v. S. J. Groves & Sons, Inc., 405

F.2d 1061, 1065-6 (4th Cir. 1969)

Fifth

Boeing Co. v. Shipman, 411 F.2d 365, 369-70 (5th Cir. 1969) (en banc)

Ninth

Kabatoff v. Safeco Insurance Co. of America, 627 F.2d 207, 209, n. 2 (9th Cir. 1980)

Tenth

Peterson v. Hager, 724 F.2d 851, 853 (10th Cir. 1984)

Eleventh

Kaiser v. Coliseum Properties, Inc., 764 F.2d 783, 785 (11th Cir. 1985)

3. Circuits where a conflict exists:

Third

Leizerowski v. Eastern Freightways, Inc., 514 F.2d 487, 490 (3d Cir. 1975) (state); Walsh v. Michle-Goss-Dexter, Inc., 378 F.2d 409, 414

(3d Cir. 1967)
(federal)

Eighth

Gisriel v. Uniroyal, Inc., 517 F.2d 699, 701 (8th Cir. 1975) (state); Lackawanna Leather Co. v. Martin & Stewart, Ltd., 730 F.2d 1197, 1200 (8th Cir. 1984) (federal)